

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:LM:CTM:LN:TL-N-3691-01

JMMarr

date:

to: Jeffrey M. Galante, Appeals Team Manager  
Jon B. Hales, Appeals Officer

from: Joyce M. Marr, Attorney (LMSB) (Laguna Niguel)  
June Y. Bass, Associate Area Counsel (LMSB)

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subject:

[REDACTED]  
EIN: [REDACTED]  
Advisory Opinion on Proper Captions for Forms 872 and 890 and  
Notice of Deficiency  
Income Tax Year: [REDACTED]  
**Statute of Limitations:** [REDACTED]

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

This is in response to your oral request for advice originally made on June 8, 2001, as subsequently modified. This memorandum should not be cited as precedent.

Issues

1. Whether the Form 872 (Consent to Extend the Time to Assess Tax) secured for [REDACTED] (the Taxpayer) for its tax year ended June 30, [REDACTED], is valid.
2. What is the proper caption to use on a Form 890 (Waiver of Restriction on Assessments & Collection of Deficiency & Acceptance of Overassessments) to be secured for the Taxpayer's tax year ended June 30, [REDACTED].
3. To which party should the Internal Revenue Service (Service) issue a notice of deficiency for the Taxpayer's tax year ended June 30, [REDACTED].

Conclusions

1. The undisputed facts clearly establish that both the

Service and [REDACTED] intended the executed Form 872 to extend the assessment period for the income tax liability of the Taxpayer for the year ended June 30, [REDACTED].

(b)(5)(AC), (b)(7)a

(b)(5)(AC), (b)(7)a

2. You should caption the Form 890 to read as follows:  
 "[REDACTED] (formerly known as [REDACTED]), as successor in interest to [REDACTED]."

3. The Service should issue the notice of deficiency to  
 "[REDACTED] (formerly known as [REDACTED]), as successor in interest to [REDACTED]."

### Facts<sup>2</sup>

The Taxpayer was incorporated in California. It filed a Form 1120, U.S. Corporation Income Tax Return, for the year ended June 30, [REDACTED].

On [REDACTED], an Agreement and Plan of Reorganization and Merger (Merger Agreement) was entered into by and among [REDACTED], a Colorado corporation ([REDACTED]), [REDACTED], a Delaware corporation ([REDACTED]) and a wholly owned subsidiary of [REDACTED], the Taxpayer and the Taxpayer's shareholders. Pursuant to the Agreement, which is

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<sup>1</sup> Under the signature of the officer who executes the Form 872, you should type in his or her title and the name "[REDACTED]."

<sup>2</sup>Our advice might be different if the facts were different. If the facts which we recite in this memorandum ultimately prove to be inconsistent with your understanding of the facts, or if we have recited facts of which you are not aware, contact this office immediately and do not rely on this memorandum.

affixed hereto as Exhibit A, the Taxpayer was to merge with and into [REDACTED], with [REDACTED] being the surviving corporation.

On or about [REDACTED], [REDACTED] was merged with and into [REDACTED], with [REDACTED] being the surviving corporation. The name of the surviving corporation was changed to "[REDACTED]" on [REDACTED]. (See Exhibits B and C affixed hereto.)

[REDACTED] assigned all the rights, interests, and obligations of [REDACTED] to the Merger Agreement to its wholly-owned subsidiary, [REDACTED], a Delaware Corporation. (See Exhibit C affixed hereto.)

On [REDACTED], the Taxpayer was merged with and into [REDACTED], with [REDACTED] (EIN: [REDACTED]) being the surviving corporation. Subsequently, [REDACTED] underwent a name change to [REDACTED].

The original statute of limitations for the Taxpayer's fiscal year ended June 30, [REDACTED], was scheduled to expire on [REDACTED].

You have secured a Form 872 for the Taxpayer's fiscal year ended June 30, [REDACTED], to extend the statute of limitations to [REDACTED], captioned in the name of "[REDACTED] (EIN: [REDACTED]) as successor in interest to [REDACTED] (EIN: [REDACTED])." A copy of the Form 872 is affixed hereto as Exhibit D. The signature block on the Form 872 is in the name of "[REDACTED]."

The Form 872 was prepared by the Service and mailed by Appeals Officer Jon Hales (Mr. Hales) to "[REDACTED]" by a letter dated [REDACTED]. Mr. Hales has been considering the Taxpayer's case and has been in contact with its representative. The representative had told Mr. Hales that the Taxpayer had been merged out of existence and that the proper party to extend the statute of limitations was "[REDACTED] ... EIN [REDACTED]." Through an INOLE obtained from IDRS, Mr. Hales determined that the EIN [REDACTED] is associated with [REDACTED]. The letter indicated in the upper right-hand corner that it was "In Re: [REDACTED]" and was for the "Tax Period(s) Ended: [REDACTED]." A copy of the letter is affixed hereto as Exhibit E.

According to the INOLE obtained by Mr. Hales and affixed hereto as Exhibit F, [REDACTED] was first established on the Service's Master File in [REDACTED]. A BMFOLI, which we requested be retrieved from IDRS and which is affixed hereto as Exhibit G, also shows that the earliest tax module for [REDACTED] is "[REDACTED]."

### Discussion

#### Issue 1

Although a Form SS-10 is not considered to be a contract, courts have nevertheless applied contract principles in determining the validity of consents to extend the statute of limitations because I.R.C. § 6501(c)(4) requires that the parties reach a written agreement as to the extension. Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983). The term agreement means a manifestation of mutual assent. Piarulle, supra, at 1042. It is the objective manifestation of mutual assent as evidenced by the parties' overt acts that determines whether the parties have made an agreement. Kronish v. Commissioner, 90 T.C. 684, 693 (1988).

In this case, the undisputed facts clearly establish that both the Service and [REDACTED] intended the executed Form 872 to extend the assessment period for the income tax liability of the Taxpayer for the year ended June 30, [REDACTED]. First, the caption on the Form 872 indicates that it is being executed by [REDACTED] "as successor in interest to [REDACTED] (EIN: [REDACTED])." Second, the transmittal letter which forwarded the Form 872 to [REDACTED] for signature indicated that it was "In Re: [REDACTED]" for the "Tax Period(s) Ended: [REDACTED]." Third, the letter was from Mr. Hales who has been actively considering the Taxpayer's case and had been in contact with its representative, who told Mr. Hales that the proper party to execute the Form 872 on behalf of the Taxpayer was "[REDACTED] ... EIN [REDACTED]." Fourth, the Form 872 refers to the tax period ended June 30, [REDACTED], although according to the information available on IDRS, it appears that [REDACTED] was not in existence until the year [REDACTED].

(b)(5)(AC), (b)(7)a

[REDACTED]

(b)(5)(AC), (b)(7)a

(b)(5)(AC), (b)(7)a

(b)(5)(AC), (b)(7)a

(b)(5)(AC), (b)(7)a

Issue 2

The Form 890 for the Taxpayer's year ended June 30, [REDACTED], should be captioned as follows: "[REDACTED]

[REDACTED] (formerly known as [REDACTED]), as successor in interest to [REDACTED]."

Issue 3

The statutory notice of deficiency for the Taxpayer's tax liability for the ending June 30, [REDACTED], should be issued to "[REDACTED] (formerly known as [REDACTED]), as successor in interest to [REDACTED]."

This advice has been coordinated with the Office of Chief Counsel. With the rendition of this advice, we are closing our file. Please contact the undersigned at telephone number (949) 360-2688 if you have any questions or comments concerning the foregoing.

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JOYCE M. MARR  
Attorney (LMSB)

Attachments: As stated